

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID ROBERT RICKARD,)
Plaintiff,) No. CV-08-0001-JPH
v.) ORDER GRANTING PLAINTIFF'S
MICHAEL J. ASTRUE,) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND REMANDING FOR ADDITIONAL
Security,) PROCEEDINGS PURSUANT TO
Defendant.) SENTENCE FOUR 42 U.S.C. §
) 405(g)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Terrye E. Shea represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

On November 22, 2005, Plaintiff David Rickard (Plaintiff) filed for supplemental security income benefits (SSI). (Tr. 20, 57-59.) Upon initial application, plaintiff alleged disability since March 12, 2004, due to mental health problems. (Tr. 66-67.) Benefits were

1 denied initially and on reconsideration. (Tr. 42-43, 44-47.)
 2 Plaintiff requested a hearing before an administrative law judge
 3 (ALJ), which was held before ALJ Richard A. Say on November 30, 2006.
 4 (Tr. 403-440.) Plaintiff, who was present and represented by counsel,
 5 medical expert W. Scott Mabee, Ph.D., and vocational expert Fred
 6 Cutler, testified. The ALJ denied benefits and the Appeals Council
 7 denied review. (Tr. 6-9, 28.) The instant matter is before this
 8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in detail in the transcript
 11 of proceedings, and are briefly summarized here. Plaintiff was 44
 12 years old at the time of filing and 45 at the hearing. (Tr. 413.)
 13 He testified that he finished the ninth grade and later obtained a
 14 GED. (Tr. 413-414.) Plaintiff served in the military for four years,
 15 and spent more than 22 years in prison. (Tr. 414.) He has past work
 16 experience as a truck driver. (Tr. 426.)

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Social Security Act (the "Act") defines "disability" as the
 19 "inability to engage in any substantial gainful activity by reason of
 20 any medically determinable physical or mental impairment which can be
 21 expected to result in death or which has lasted or can be expected to
 22 last for a continuous period of not less than twelve months." 42
 23 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
 24 Plaintiff shall be determined to be under a disability only if any
 25 impairments are of such severity that a Plaintiff is not only unable
 26 to do previous work but cannot, considering Plaintiff's age, education
 27 and work experiences, engage in any other substantial gainful work

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1 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
2 1382c(a)(3)(B). Thus, the definition of disability consists of both
3 medical and vocational components. *Edlund v. Massanari*, 253 F.3d
4 1152, 1156 (9th Cir. 2001).

5 The Commissioner has established a five-step sequential
6 evaluation process for determining whether a person is disabled. 20
7 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is
8 engaged in substantial gainful activities. If so, benefits are
9 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,
10 the decision maker proceeds to step two, which determines whether
11 Plaintiff has a medically severe impairment or combination of
12 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

13 If Plaintiff does not have a severe impairment or combination of
14 impairments, the disability claim is denied. If the impairment is
15 severe, the evaluation proceeds to the third step, which compares
16 Plaintiff's impairment with a number of listed impairments
17 acknowledged by the Commissioner to be so severe as to preclude
18 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
19 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
20 meets or equals one of the listed impairments, Plaintiff is
21 conclusively presumed to be disabled. If the impairment is not one
22 conclusively presumed to be disabling, the evaluation proceeds to the
23 fourth step, which determines whether the impairment prevents
24 Plaintiff from performing work which was performed in the past. If a
25 Plaintiff is able to perform previous work, that Plaintiff is deemed
26 not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
27 this step, Plaintiff's residual functional capacity ("RFC") assessment
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1 is considered. If Plaintiff cannot perform this work, the fifth and
 2 final step in the process determines whether Plaintiff is able to
 3 perform other work in the national economy in view of Plaintiff's
 4 residual functional capacity, age, education and past work experience.
 5 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
 6 482 U.S. 137 (1987).

7 The initial burden of proof rests upon Plaintiff to establish a
 8 *prima facie* case of entitlement to disability benefits. *Rhinehart v.*
 9 *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
 10 1111, 1113 (9th Cir. 1999). The initial burden is met once Plaintiff
 11 establishes that a physical or mental impairment prevents the
 12 performance of previous work. The burden then shifts, at step five,
 13 to the Commissioner to show that (1) Plaintiff can perform other
 14 substantial gainful activity and (2) a "significant number of jobs
 15 exist in the national economy" which Plaintiff can perform. *Kail v.*
 16 *Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

17 Plaintiff has the burden of showing that drug and alcohol
 18 addiction ("DAA") is not a contributing material factor to disability.
 19 *Ball v. Massanari*, 254 F. 3d 817, 823 (9th Cir. 2001). The Social
 20 Security Act bars payment of benefits when drug addiction and/or
 21 alcoholism is a contributing factor material to a disability claim. 42
 22 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v. Callahan*, 143 F. 3d
 23 1240, 1245 (9th Cir. 1998). If there is evidence of DAA and the
 24 individual succeeds in proving disability, the Commissioner must
 25 determine whether the DAA is material to the determination of
 26 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds that
 27 the claimant is not disabled, then the claimant is not entitled to
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1 benefits and there is no need to proceed with the analysis to
 2 determine whether alcoholism is a contributing factor material to
 3 disability. However, if the ALJ finds that the claimant is disabled
 4 and there is medical evidence of drug addiction or alcoholism, then
 5 the ALJ must proceed to determine if the claimant would be disabled if
 6 he or she stopped using alcohol or drugs. *Bustamante v. Massanari*,
 7 262 F. 3d 949 (9th Cir. 2001.)

8 **STANDARD OF REVIEW**

9 Congress has provided a limited scope of judicial review of a
 10 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the
 11 Commissioner's decision, made through an ALJ, when the determination
 12 is not based on legal error and is supported by substantial evidence.
 13 See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
 14 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
 15 determination that a plaintiff is not disabled will be upheld if the
 16 findings of fact are supported by substantial evidence." *Delgado v.*
 17 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
 18 Substantial evidence is more than a mere scintilla, *Sorenson v.*
 19 *Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than
 20 a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th
 21 Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846
 22 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such
 23 evidence as a reasonable mind might accept as adequate to support a
 24 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 25 (citations omitted). "[S]uch inferences and conclusions as the
 26 [Commissioner] may reasonably draw from the evidence" will also be
 27 upheld. *Mark v. Celebrenze*, 348 F.2d 289, 293 (9th Cir. 1965). On
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1 review, the Court considers the record as a whole, not just the
 2 evidence supporting the decision of the Commissioner. *Weetman v.*
 3 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,
 4 648 F.2d 525, 526 (9th Cir. 1980)).

5 It is the role of the trier of fact, not this Court, to resolve
 6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 7 supports more than one rational interpretation, the Court may not
 8 substitute its judgment for that of the Commissioner. *Tackett*, 180
 9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 10 Nevertheless, a decision supported by substantial evidence will still
 11 be set aside if the proper legal standards were not applied in
 12 weighing the evidence and making the decision. *Brawner v. Secretary*
 13 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987). Thus,
 14 if there is substantial evidence to support the administrative
 15 findings, or if there is conflicting evidence that will support a
 16 finding of either disability or nondisability, the finding of the
 17 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 18 1230 (9th Cir. 1987).

19 **ALJ'S FINDINGS**

20 At step one of the sequential evaluation, the ALJ found plaintiff
 21 had not engaged in substantial gainful activity since the onset date
 22 of March 12, 2004. (Tr. 22.) At steps two and three, he found
 23 plaintiff had the severe impairments of personality disorder,
 24 depressive disorder, alcohol abuse, and status post broken right leg
 25 (on two occasions) (Tr. 22), but these impairments alone or in
 26 combination did not meet or equal one of the listed impairments in
 27 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 23-
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1 24.) The ALJ found plaintiff less than fully credible. (Tr. 25-27.)
2 He determined plaintiff had the residual functional capacity (RFC) to
3 perform a wide range of light work. (Tr. 24.)

4 At step four, based on vocational expert testimony, the ALJ
5 determined plaintiff could not perform his past relevant work. (Tr.
6 27.) At step five, also relying on the VE's testimony, the ALJ found
7 transferability of skills was not material, and plaintiff could
8 perform other work such as produce inspector, laundry worker, and
9 garment inspector. (Tr. 28.) Therefore, plaintiff was not found
10 "disabled" as defined in the Social Security Act at any time through
11 the date of the ALJ's decision. (Tr. 28.)

12 **ISSUE**

13 The question is whether the ALJ's decision is supported by
14 substantial evidence and free of legal error. Specifically, plaintiff
15 argues the ALJ failed to properly credit the opinion of testifying
16 psychological expert Walter Scott Mabee, Ph.D., with respect to
17 limitations caused by psychological impairment, and failed to
18 incorporate these impairments into his hypothetical resulting in error
19 at step five. (Ct. Rec. 14 at 11-12). The Commissioner responds that
20 the ALJ's decision is supported by substantial evidence, free of legal
21 error, and should be affirmed. (Ct. Rec. 16 at 2.)

22 **DISCUSSION**

23 **A. RFC and Step Five**

24 Plaintiff alleges the ALJ failed to properly credit the opinion
25 of testifying psychological expert Dr. Mabee, specifically because ALJ
26 Say's hypothetical failed to include all of the psychological
27 impairments assessed by Dr. Mabee after he reviewed the record. (Ct.
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1 Rec. 14 at 11.) The Commissioner responds that the ALJ accepted Dr.
 2 Mabee's opinion of plaintiff's impairments and resulting limitations,
 3 and incorporated them into his RFC. (Ct. Rec. 16 at 5-6).

4 In addition to medical reports in the record, the analysis and
 5 opinion of a non-examining medical expert selected by an ALJ may be
 6 helpful to the adjudication. *Andrews v. Shalala*, 53 F. 3d 1035, 1041
 7 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F. 2d 747, 753 (9th
 8 Cir. 1989)). Testimony of a medical expert may serve as substantial
 9 evidence when supported by other evidence in the record. *Id.*

10 When presented with conflicting medical opinions, the ALJ must
 11 determine credibility and resolve the conflict. *Matney v. Sullivan*,
 12 981 F.2d 1016, 1019 (9th Cir. 1992). However, the ALJ's findings must
 13 be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d
 14 1229, 1231 (9th Cir. 1990).

15 After reviewing the record, Dr. Mabee opined that plaintiff
 16 suffers from a personality disorder with avoidant, dependent, and
 17 anti-social features; this causes periodic problems with mood
 18 stability. (Tr. 406.) He diagnosed alcohol abuse based in part on
 19 plaintiff's blood alcohol concentration of .257, registered in the
 20 hospital after he fell or jumped (the record is unclear) from a height
 21 of nearly fifteen feet and broke his leg. (Tr. 406, referring to
 22 Exhibit 11F.) Dr. Mabee reviewed Listings 12.04 (mood disorders),
 23 12.08 (personality disorders), and 12.09 (substance abuse). He opined
 24 no Listings were met or medically equaled. (Tr. 406-407.)

25 Dr. Mabee assessed marked and moderate psychological impairment
 26 in several areas, including the ability to: maintain social
 27 functioning, interact appropriately with the general public, accept

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1 criticism and instruction from supervisors (marked); interact
2 appropriately with co-workers, and respond to workplace changes
3 (moderate). (Tr. 407-409.) Dr. Mabee testified that he assessed
4 these limitations without considering the affects of alcohol abuse,
5 except that plaintiff's moderate impairment in the ability to respond
6 to changes in the workplace would be more severe (marked) if
7 substance abuse is included. (Tr. 411.)

8 The following exchange between the ALJ and Dr. Mabee addressed
9 impairments in social functioning:

10 Q: It sounds like he'd have trouble working
11 around people. How about with respect to working
with the general public?

12 A: I believe I rated that as marked [sic] limited
13 ability to interact with the general public.

14 Q: You've also marked his ability to accept
15 criticism, accept instruction and criticism from
supervisors and [sic] marked. Would such an individual
be able to accept any supervision or criticism or would
it lead to problems all the time?

16 A: The ability to accept criticism, fairly
17 superficial interactions I think is there. It's when
demands are increased, when expectations are counter
18 to what maybe his goals might be, I'd seek [sic]
more marked limitations. I did not raise it as
19 extreme or severely limited in that there's
absolutely no capacity so -

20 (Tr. 409.) The ALJ stopped his questioning this point. Plaintiff's
21 counsel asked Dr. Mabee:

22 Q: In terms of your overall view of the record how would
23 you rate Mr. Rickard's ability to handle stress and not
just in everyday life but also in the workplace?

24 A: As I saw the record the stress is from
25 interpersonal relationships and that's where I try to
identify the greater limitations and so the ability
26 to handle those types of stresses [sic] interpersonal stresses
I think are, as I said, markedly limited. There is
27 significant impairment in those areas.

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1 (Tr. 409.)

2 Plaintiff's counsel asked Dr. Mabee whether the degree of
3 impairment he assessed would be the same if the effects of alcohol
4 abuse were excluded:

5 Q: Were the ratings that you've given today would that
6 be absent the effects of any DANA [sic] concerns?

7 A: Probably all except the ability to respond to
8 changes. I think alcohol abuse makes that a more
9 impaired area and so the ratings that I've provided
10 generally are without the effects of substance abuse.
11 So adaptation in the workplace, I believe I rated one
12 of those as moderately limited, that would likely
13 seek [sic] greater difficulties with substance abuse.

14 Q: All right. So moderate without - -

15 A: Correct.

16 Q: Worse with?

17 (Tr. 411-412.) Dr. Mabee did not directly answer this question, but
18 the clear inference from his testimony is that plaintiff's ability to
19 adapt to changes in the workplace is moderately limited without
20 considering the effects of substance abuse, and markedly limited when
21 it is included.

22 In his RFC assessment, the ALJ does not included a moderate (or
23 marked) impairment in plaintiff's ability to adapt to changes in the
24 workplace, with or without the effects of substance abuse. The sole
25 mental limitation is that plaintiff "should only have superficial
26 contacts with supervisors, co-workers, and the public." (Tr. 24.)
27 Although the ALJ purports to adopt Dr. Mabee's assessed limitations,
28 he gives no reason for failing to credit (or for rejecting) Dr.
Mabee's opinion that plaintiff is moderately limited in his ability to
adapt to changes in the workplace, and even more limited when the
effects of substance abuse are included. Nor did the ALJ include this

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1 impairment in his step five hypothetical to the VE. This is error.
 2 "If a claimant shows that he or she cannot return to his or her
 3 previous job, the burden of proof shifts to the Secretary to show that
 4 the claimant can do other kinds of work." *Embrey v. Bowen*, 849 F.2d
 5 418, 422 (9th Cir. 1988). The vocational expert's opinion cannot be
 6 accepted if it is unsupported by the evidence, i.e., is not based on
 7 all of a plaintiff's limitations and restrictions supported by the
 8 record. See e.g., *Magallanes v. Bowen*, 881 F. 2d 747, 756 (9th Cir.
 9 1989).

10 **B. Remand**

11 Plaintiff's psychological RFC is an administrative finding which
 12 is reserved to the Commissioner, and, by delegation of authority, to
 13 the ALJ. SSR 96-5p. It is thus the responsibility of the ALJ, not
 14 this Court, to make an RFC determination. Accordingly, plaintiff's
 15 psychological RFC must be redetermined, on remand, taking into
 16 consideration the opinion of the testifying expert, as well as any
 17 additional or supplemental evidence relevant to plaintiff's claim for
 18 disability benefits. Plaintiff's new psychological RFC assessment
 19 should be presented to a vocational expert, at a new hearing, in order
 20 to determine if he is capable of any work.

21 If the ALJ found plaintiff disabled, he would have been required
 22 to conduct the *Bustamante*¹ analysis to determine whether substance
 23 abuse materially contributed to plaintiff's impairments. The expert
 24 psychologist testified that plaintiff suffers from alcohol abuse and
 25 from (among other impairments) a moderate impairment in the ability to
 26 adapt to changes in the workplace; a limitation which becomes marked

27 28 ¹*Bustamante v. Massanari*, 262 F. 3d 949 (9th Cir. 2001).

1 when DAA is included. The record contains evidence of substance
2 abuse, including a reported history of intravenous drug ingestion, of
3 use of PCP, opiates, crack cocaine, and alcohol. (Tr. 180.) The ALJ
4 asserted he was adopting Dr. Mabee's assessment but omitted this
5 impairment without explanation. On remand the ALJ should perform the
6 *Bustamante* analysis if necessary. The court expresses no opinion as
7 to what the ultimate outcome on remand will or should be. The fact-
8 finder is free to give whatever weight to the evidence is deemed
9 appropriate. See *Sample v. Schweiker*, 694 F. 2d 639, 642 (9th Cir
10 1982) ("Q)uestions of credibility and resolution of conflicts in the
11 testimony are functions solely of the Secretary").

12 **CONCLUSION**

13 The ALJ's decision contains error which is not harmless. A
14 remand for further proceedings is the proper remedy. On remand, the
15 ALJ will conduct a new sequential evaluation, make a new RFC
16 determination, take additional vocation expert testimony at step five
17 and conduct the *Bustamante* analysis, if appropriate.

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
20 **GRANTED**. The matter is remanded to the Commissioner for additional
21 proceedings pursuant to sentence four 42 U.S.C. 405(g).

22 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
23 **DENIED**.

24 3. An application for attorney fees may be filed by separate
25 motion.

26 The District Court Executive is directed to file this Order and
27 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
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1 be entered for Plaintiff and the file shall be **CLOSED**.

2 DATED August 18th, 2008.

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4 s/ James P. Hutton

5 JAMES P. HUTTON

6 UNITED STATES MAGISTRATE JUDGE

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